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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

NORMAN LEE PIMENTEL,

Defendant and Appellant.

F056795

(Super. Ct. No. F08901760)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Edward Sarkisian, Jr., Judge.

Melanie K. Dorian, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and John G. McLean, Deputy Attorneys General, for Plaintiff and Respondent.

* Before Wiseman, Acting P.J., Hill, J. and Poochigian, J.

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Defendant Norman Lee Pimentel was charged with battery with serious bodily injury (Pen. Code,¹ § 243, subd. (d); count 1), assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1); count 2), and making criminal threats (§ 422; count 3). The jury found defendant not guilty of the charged offenses but convicted him of the lesser included offenses of misdemeanor battery (§ 242) in count 1, and misdemeanor assault (§ 240) in count 2. Defendant was sentenced to 180 days in the county jail with credit for 240 days served. On appeal, defendant contends, and the People concede, that defendant's conviction for misdemeanor assault must be reversed because it is a lesser included offense of the conviction for misdemeanor battery. We agree and reverse defendant's misdemeanor assault conviction. In all other respects, we affirm.

FACTS

On the morning of March 12, 2008, John Borelli arrived at his place of business and noticed glass and a makeshift barricade in the driveway he shared with defendant's business. When he moved the barricade, defendant came out and started yelling, cursing, and threatening him. Borelli called 911. He then grabbed a broom from his office and started sweeping up the glass. Defendant ran out of his building and began calling Borelli names and threatening him again. Borelli flagged down Fresno Police Officer Christopher Franks. As Franks was trying to defuse the situation, he saw defendant charge Borelli and tackle him to the ground. Borelli fell face down on the sidewalk and was unconscious for several minutes.

¹ Further statutory references are to the Penal Code unless otherwise specified.

DISCUSSION

Defendant contends that his conviction of assault in count 2 must be reversed because it was a lesser included offense of battery, of which he was convicted in count 1. The People agree, as do we. A defendant cannot be convicted of both assault and battery on the same victim for the same act, because every battery includes assault, and when a defendant is convicted of a greater and lesser included offense, the conviction for the lesser offense must be reversed. (*People v. Pearson* (1986) 42 Cal.3d 351, 355; *People v. Lopez* (1975) 47 Cal.App.3d 8, 15.)

DISPOSITION

Defendant's conviction for misdemeanor assault in count 2 is reversed. In all other respects, the judgment is affirmed.